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Mr. Dale Harvey, Sr. Engineer

Regional Water Quality Control Board

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Re: Comments to CVWB Draft Orders on Produced Water Discharges to Ponds

Dear Mr. Harvey,

We have received and reviewed the three proposed draft general orders the Central Valley Water Board (CVWB) released that describe pond waste discharge requirements (WDRs) for production water to land. These proposed drafts were reviewed by comparison to the equivalent water quality standards and statutes governing the CVWB's actions related to groundwater in the Tulare Lake Basin. We support and desire to amicably work with the CVWB to find reasonable and workable routes to water quality and simultaneously support and promote all uses of groundwater for our region.

As a result of our review, we have a number of comments and we request that when the proposed orders are adopted and published as final orders, they consider the overall impacts to similarly situated entities and provide flexibility so such orders do not force businesses to close and cease operation in oil producing fields that have been in production for decades.

We note that the costs/benefits associated with running our oil field leases that utilize surface sumps for produced water are nearly prohibitive under current legislative and regulatory conditions—adding additional costs will require lay-offs and the shut-in of our leases along with many other small entities in the Tulare Lake Basin. We understand the CVWB does not want to close businesses in our valley. We also note that the deliverables demanded, particularly those in the Westside oil fields of the Kern County, do not bear a reasonable relationship to the need for the actions and the benefits to be obtained from the reports. Throughout the Porter-Cologne Act, there is an underlying requirement of reasonableness to the regulation of water quality in the state. For example, under California Water Code section 13300, the State may only regulate water quality "reasonably, considering all demands being made and to be made on those waters."

Similarly, under section 13050, "pollution means any alteration of the quality of water which may unreasonably affect" the waters of the state. While each regional board is required to ensure the "reasonable protection of beneficial uses,…it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." (CWC § 13241 [setting forth the Act's water quality objectives].) These multiple references to reasonableness indicate the legislature's desire for moderation and balance. These orders fall short of that statutory requirement and we request they be revised to resolve this conflict.

In support of water use to the fullest extent, we note that "[i]t is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." (Cal. Const., art. X, § 2.) We further note that, "California's policy on water quality is set forth in the Porter–Cologne Water Quality Control Act (CWC § 13000 et seq.) Activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.' (CWC § 13000.)" (*County of Sacramento v. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 1579, 1582-83.)

We strongly believe that any orders must consider all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible under the board's authority. Such authority is subject to the limitations adopted by the State Water Board in California Code of Regulations, Title 23, Division 3, Chapter 15, section 2510, subdivision (c). Section 2510 provides that compliance with prescriptive standards issued from the Regional or State Board may not be feasible when such compliance (1) is unreasonably and unnecessarily burdensome and will cost substantially more than alternatives which meet the criteria in subsection (b) of this section; or (2) is impractical and will not promote attainment of applicable performance standards. Regional boards shall consider all relevant technical and economic factors including, but not limited to, present and projected costs of compliance, potential costs for remedial action in the event that waste or leachate is released to the environment, and the extent of groundwater resources which could be affected.

As mentioned above, many of the water quality objectives stem from the Porter-Cologne Act that is animated by a pragmatic regulatory philosophy, with the goal of attaining the "highest water quality which is reasonable" considering a wide range of factors, including the economic and societal impacts of water-quality regulation measures. This pragmatic balance is reflected in the Act's focus on a "reasonableness" assessment that weighs environmental, economic and social concern. The Act provides that, regional boards, in setting water-quality objectives, may account for "economic considerations" even-if "it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." (CWC § 13241(d)) The use of state waters for the discharge of waste is therefore recognized as a permissible use when reasonable. In sum, "the basic policy of the law is to protect water quality by the

reasonable regulation of waste discharges," accomplished by the state and regional boards "in [the] balancing of economic and environmental interests."

The State Board's Guidance Memorandum defines the term "maximum benefit to the people of the State" as follows: "Before a discharge to high quality water may be allowed, it must be demonstrated that any change in water quality 'will be consistent with the maximum benefit to the people of the state.' This determination is made on a case-by-case basis and is based on considerations of reasonableness under the circumstances at the site. Factors to be considered include (1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods. With reference to economic costs, both costs to the discharger and the affected public must be considered.[1]

We also notice that the orders' are missing the full language of select statutes and request that language be inserted into the orders for future consideration. References to California Water Code section 13263(a) omit a key provision of that statute—the consideration of the provisions of California Water Code section 13241, including economic provisions. The economic impacts of these orders must be considered when drafting the orders' deliverables. Also, the orders' comments related to any CEQA exemptions ignore some exemptions that should be included, such as California Water Code section 13389 and California Code of Regulations, Title 14, section 15263.

Finally, we are concerned that the proposed orders appear to compel the State or Regional Board to take action that results in regulating property to a degree that amounts to a taking. Regulatory takings occur when a regulation becomes so onerous that it has the practical effect of a direct appropriation of property. To create the risk of a compensable taking, the public agency action must be the direct or "proximate" cause of the claimed harm to the property. Here, the orders as drafted creates exposure to claims that the orders "on their face" create a compensable taking of property and thus creates an unconstitutional result.

We appreciate your consideration of our comments. If you have any questions regarding the comments or the compatibility with existing law, or any responses, please contact [Name].

Sincerely,

Howard E. Caywood
President

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[1] See State Board Order No. WQ 86–17, at 22, n. 10.